March 26, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: National Security Archive

Date of Filing: March 1, 2007

Case Number: TFA-0190

On March 1, 2007, the National Security Archive (the Appellant) filed an Appeal from a February 13, 2007 final determination issued pursuant to the Freedom of Information Act (FOIA). In that Determination, the Office of Policy and International Affairs (Denying Office) of the Department of Energy (DOE) partially denied the Appellant's request for information submitted under the FOIA, 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the Denying Office to release the information it withheld.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In a letter dated June 7, 2004, the Appellant submitted a FOIA request to the Denying Office for "[a]ll documents referencing Iraq written, signed, or received, in whole or in part, by James E. Hart, senior oil market advisor within the U.S. Department of Energy Office of Policy and International Affairs, dated from February to April, 2003." Request Letter dated June 7, 2004, from Barbara Elias, FOI Coordinator, Appellant, to Abel Lopez, Director, FOIA / PA Division, DOE (Request Letter). On February 13, 2007, the Denying Office responded that it had identified 16 documents as responsive to the Appellant's request. Determination Letter dated February 13, 2007, from Abel Lopez, to Barbara Elias. (Determination Letter). It released three documents in full and withheld the other 13 in their entirety. *Id.* The Denying Office withheld the 13 documents under the deliberative process privilege pursuant to 5 U.S.C. § 552(b)(5) (Exemption 5).

In its Appeal, the Appellant disputes the withholding of information under Exemption 5. First, the Appellant argues Exemption 5 was applied too broadly to these documents.

Appeal Letter dated March 1, 2007, from Roger Strother, Appellant, to Director, Office of Hearings and Appeals. In addition, the Appellant asserts that, even if the reports can be withheld under Exemption 5, the factual portions of the documents should have been segregated and released. *Id.*

II. Analysis

Exemption 5 protects "inter-agency or intra-agency memoranda or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in a civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Included within the boundaries of Exemption 5 is the "predecisional" privilege, sometimes referred to as the "executive" or "deliberative process" privilege. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). The predecisional privilege permits the agency to withhold records that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink,* 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).[*/]

[*/]The Appellant argues that DOE must be able to identify a specific agency decision, and the role those documents played in the agency's arrival at that final decision, in order to withhold a document under the deliberative process privilege and under Exemption 5. Appeal Letter. The Appellant relies on *Paisley v. CIA*, 712 F.2d 686 (D.C. Cir. 1983), *vacated in part*, 724 F.2d 201 (D.C. Cir. 1984), which actually advises that "[t]o ascertain whether the documents at issue are pre-decisional, the court must first be able to pinpoint an agency decision or policy to which these documents contributed." *Paisley*, 712 F.2d at 698 (emphasis added). Initially, we note that the requested documents may point to a policy that DOE has concerning the subject matter of the documents. Despite the Appellant's argument to the contrary, *Paisley* does not require that a specific agency decision be identified. We believe that *Sears*, which does not require a specific agency decision to be identified, still controls in matters relating to Exemption 5. *Sears*, 421 U.S. at 151 n.18.

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

Id; see also Schell v. HHS, 843 F.2d 933, 941 (6th Cir. 1988); *Hamilton Sec. Group, Inc., v. HUD*, 106 F. Supp. 2d 23, 30 (D.D.C. 2000), *aff'd*, 2001 WL 238162 (D.C. Cir. Feb 23, 2001); *Greenberg v. Dep't of Treasury*, 10 F. Supp. 2d 3 (D.D.C. 1998); *Hunt v. United States Marine Corps*, 935 F. Supp. 46, 51 (D.D.C. 1996) .

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather than the final policy of the agency. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

In addition, the FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

There are, however, exceptions to these general rules that factual information should be released. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Dudman Communications. Corp. v. Dep't of Air Force*, 815 F.2d 1565 (D.C. Cir. 1987); *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

The Denying Office has listed 13 documents that it withheld in their entirety because they contain information that is predecisional and part of the deliberative process. We have been provided with copies of these documents. We have reviewed these documents and believe that documents 6, 9, 10, 11, 13, 14, and 15 were properly withheld under Exemption 5. The factual information contained in these documents is so intertwined as to make segregation virtually impossible. Further, the factual information contained in these documents was selected from a larger quantity of factual information so that the selection is part of the deliberative process. These documents were prepared by an advisor who reviewed many facts but relied on only selected facts for these documents.

However, in regard to documents 4, 5, 7, 8, 12, and 16, we believe that there is factual information contained therein that could be segregated and released. As an example, the first sentence of document 4 states, "[t]he strike in Venezuela began on December 2, with Venezuelan oil production having ground nearly to a halt over the following two weeks." This information is available on the Internet through a simple search. *Venezuela Strike Worsens Oil Situation*, www.usatoday.com / news / world / 2002-12-17-venezuela-strike-oil_x. htm, accessed March 14, 2007. Furthermore, some of the information contained in this

document and documents 7 and 8 looks strikingly similar to information found in documents 1 and 3, which were released to the Appellant.

Document 5 contains copies of two news articles published by Reuters. Through another simple Internet search, both of these articles are also available to the public. Furthermore, these articles are not part of the predecisional deliberative process. The authors are not DOE employees, but rather members of the news media. The fact that they were included in a paper prepared for someone else within the DOE does not exempt them from disclosure under Exemption 5. In addition to the news articles, there appears to be other releasable, factual information, such as the title of the document and the first two paragraphs. The information contained therein is public and available to people outside of the DOE, such as those who participated in the summit referred to in the document.

Finally, we believe that documents 12 and 16 also contain facts that could be segregated and released to the Appellant.

III. The Public Interest

The fact that the requested material falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. 1004.1. In this case, no public interest would be served by release of the comments and opinions contained in the documents withheld in their entirety, which consist solely of advisory opinions and recommendations. The release of this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were reluctant to provide information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions, which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987); *Newhouse News Service*, 28 DOE ¶ 80,241 (September 4, 2002) (Case No. VFA-0758).

IV. Conclusion

The Denying Office properly withheld documents 6, 9, 10, 11, 13, 14, and 15 under the Exemption 5 deliberative process privilege. We believe that portions of documents 4, 5, 7, 8, 12, and 16 contain factual information that could be segregated and released to the Appellant. We will remand the matter to the Denying Office for a further consideration

of those documents listed above to determine what information can be segregated and released. Therefore, the Appeal will be denied in part and granted in part.

It Is Therefore Ordered That:

(1) The Appeal filed by National Security Archive on March 7, 2003, Case No. TFA-0190, is hereby granted as specified in Paragraph (2) below, and is denied in all other respects.

(2) This matter is hereby remanded to the Office of Policy and International Affairs of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought either in the district where the requester resides or has a principal place of business or in which the agency records are situated or in the District of Columbia.

William M. Schwartz
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Office of Hearings and Appeals

Date: March 26, 2007